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Supreme Court of the United States

October Term 1971
No. 70-160

MILTON LUROS, REUBEN STURMAN, LONDON PRESS, INC., and WORLD WIDE NEWS, INC.,
Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Essential Procedural Facts	2
Matter Not in Issue	3
Argument	4
The Instant Case Does Not Present a Substantial Federal Question Justifying Grant of a Writ of Certiorari	4
I. The Instant Fact Situation Is Not Likely to Re-Occur	4
II. The Decision Below Is Correct	5
Conclusion	5

TABLE OF AUTHORITIES CITED

Cases	Page
Ker v. California, 374 U.S. 23	2
People v. Luros, 4 Cal. 3d 84	1, 2
Rice v. Sioux City Memorial Cemetery, 349 U.S. 70	4
Rules	
Rules of the Supreme Court of the United States, Rule 19	2
Statutes	
California Penal Code, Sec. 995	1, 2, 3
United States Code, Title 28, Sec. 1257(3)	1, 2, 6
Textbook	
36 Law Week, p. 3316	3

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Opinion Below.

The opinion of the Supreme Court of California is reported in 4 Cal. 3d 84 under the designation of *People v. Luros, et al.*, and is also reproduced as Appendix C of the petition, at pp. 22-33 thereof (the dissent is also reproduced, at pp. 34-55).

Jurisdiction.

Respondent contends that jurisdiction is not conferred by 28 U.S.C. 1257(3), in that the decision of the California Supreme Court, although *final as to the issue before it* (namely, whether the indictment should be set aside *before trial* under California Penal Code

section 995),[1] is only *interlocutory as to the fundamental underlying prosecution*. Petitioners have not even been brought to trial; obviously, then, they have exhausted neither the trial nor post-trial procedures available to them under California law.

Even if the decision below, by being final to one phase of a prosecution, is sufficient to meet the bare technical minimum requirements of 28 U.S.C. 1257(3), we submit that the fact that only one aspect of the underlying prosecution is thereby resolved mitigates against the granting of this discretionary writ. (*Cf.* Rule 19, and our argument, part I, *infra.*)

Question Presented.

Respondents submit that the question here is only whether the refusal of the California Courts to set aside the indictment, thereby enabling petitioners to be brought to trial, violates petitioners' right to Due Process of Law under the Fourteenth Amendment.

Essential Procedural Facts.

Respondent submits that the only matter litigated in this aspect of *People v. Luros, et al.,* in the court below is much narrower and simpler than the Petition suggests, and may be summarized as follows:

Defendants agreed (or conspired) to print, publish, and distribute certain books. At the grand jury hearing in June, 1966, the People used, as evidence of con-

[1]This motion is normally heard well before trial; the evidence is chiefly from the transcript of proceedings before the grand jury; if the motion is denied, the matter is set for trial some time later, so witnesses may be subpoened, etc.; if the motion is granted, defendant is released, but the people may appeal (as in the instant case). We note this aspect of California criminal procedure because the footnotes in *Ker v. California,* 374 U.S. 23, give a mistaken view of normal procedure with such motions.

temporary community standards, a book ("Sex Life of a Cop") found obscene by both the California and Federal courts. Between the grand jury hearing, and the decision on the motion to set aside the indictment involved in this proceeding (*i.e.*, a motion under California Penal Code § 995), the United States Supreme Court reached an opposite conclusion, and held "Sex Life of a Cop" not obscene.

On this state of the record, the Superior Court of California for the County of Los Angeles set aside the indictment on a pretrial defense motion under California Penal Code section 995. The Supreme Court of California disagreed, and reversed this action; thereby a trial is made possible.

Matter Not in Issue.

The People submit that it is clear from the opinion below, and the foregoing resume, that the *actual obscenity* of the books involved was not in issue in the appeal decided by the court below; *this will have to await trial.*

Accordingly, we submit that the obscenity of the four books is immaterial to this appeal. However, despite petitioners' innocent characterizations of them, we understand that one of these books, namely "Just for Kicks", was involved in the *conviction* in *People v. Bray* (outside Los Angeles County), as to which certiorari was denied (see 36 Law Week 3316, and 390 U.S. 987).

ARGUMENT.

The Instant Case Does Not Present a Substantial Federal Question Justifying Grant of a Writ of Certiorari.

I.

The Instant Fact Situation Is Not Likely to Re-Occur.

We submit that it is a well established requirement of Rule 19 that a case present "a federal question of substance" in order to justify grant of certiorari, which means that the case must have importance to more than the parties to the lawsuit. As is stated in *Rice v. Sioux City Memorial Cemetery*, 349 U.S. 70, 74:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. Mangum Import Co. v. Coty, 262 U.S. 159, 163, 43 S.Ct. 531, 532, 67 L.Ed. 922; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1959, 69 Sup.Ct. v. vi.; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law. Inst. 313. *'Special and important reasons' imply a reach to a problem beyond* the academic or *the episodic.*" (Emphasis added.)

We submit that the instant case presents a classic example of the "academic or the episodic". For it to occur will require (1) that the prosecutor use as a standard for comparison on obscenity, a work passed on by the highest state court, and by lower federal courts; (2) that enough delay then occur so that the

same work could be reviewed by this honorable court; (3) that the work in fact be reviewed by this court, *and* be found not obscene; (4) that state law provide for an appealable pretrial motion to dismiss; (5) that state law (unlike federal criminal procedure) provide for a transcript of grand jury proceedings so this issue can be raised.

We submit that the mere list of factors required to present this case makes it clear that a similar case is very unlikely to occur; thus any decision would be very limited (probably, of individual) application.

Thus, however interesting from an academic or intellectual standpoint this case might be, we submit that this case does not meet the basic standard for certiorari as stated by Rule 19.

II.

The Decision Below Is Correct.

Finally, we submit that a further reason why review is not needed here, is that the decision below is correct. As to our reasons for this position, we rely on the opinion itself with one further comment: we submit that a reading of this decision shows a careful following of this honorable court's decisions, rather than any denial of due process of law to petitioners.

Conclusion.

Respondent submits that this case essentially presents a narrow point of state procedure, unlikely to occur again, rather a substantial federal question. As such, it does not qualify for certiorari.

Finally, if certiorari is now denied, petitioners only *face* is a *trial* in the state courts for conspiracy to distribute obscene matter. If any aspects of this underlying

prosecution present substantial federal questions, *and* if petitioners fail in the state courts on trial, or on appeal thereafter, then they may still bring certiorari; only at such a latter date, we submit, will there be compliance with the *spirit*, as well as with the letter, of the *finality* requirement of 28 U.S.C. 1257(3).

Accordingly, the petition should be denied.

Respectfully submitted,

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